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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all similarly
situated,

Plaintiffs,

vs.

GOOGLE LLC,
Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' OPPOSITION TO
GOOGLE'S MOTION TO EXCLUDE
WITNESS BLAKE LEMOINE (DKT.
1015)**

Judge: Hon. Yvonne Gonzalez Rogers

Date: November 29, 2023

Time: 9:00 a.m.

Location: Courtroom 1 – 4th Floor

1 **I. BACKGROUND**

2 Blake Lemoine is a former senior software engineer at Google with highly relevant
3 personal knowledge about the inner workings within Google, including Google's use of private
4 browsing data. If given the opportunity, as detailed in the sworn declaration supporting this
5 opposition, Mr. Lemoine will testify at trial regarding, among other things, how Google's
6 internal algorithms, machine learning, and artificial intelligence services rely on users' private
7 browsing data, including data collected while users are in Chrome Incognito mode. He will also
8 testify that Google's algorithms, machine learning, and artificial intelligence services can
9 reidentify people and their devices even when they are browsing in a private browsing mode.
10 Mr. Lemoine will also testify that Google actively tried to limit written documentation of these
11 practices and retaliated against employees that raised concerns. These are bombshell revelations
12 that go to the heart of this case, and Google has no answer for them.

13 There is no basis for Google's request to bar Mr. Lemoine from testifying. The only
14 reason Plaintiffs could not disclose Mr. Lemoine earlier is because Google never disclosed him
15 as someone with relevant information. Had Google done so at the outset of the case, or at any
16 other point during the discovery period, including in response to discovery served by Plaintiffs
17 seeking to identify people like Mr. Lemoine, Plaintiffs would have requested his documents and
18 taken his deposition in the ordinary course. Having concealed a critical witness from Plaintiffs
19 for years, Google now claims it is too late to do anything about it, despite the fact that there
20 remains ample time to produce his custodial documents and take his deposition before trial.
21 Plaintiffs were also justified in not disclosing Mr. Lemoine sooner because he only attempted
22 to contact Plaintiffs' counsel for the first time on August 8, 2023—after reading news articles
23 about the Court's order denying Google's motion for summary judgment. After speaking with
24 Mr. Lemoine on August 15, 2023, Plaintiffs' counsel disclosed him as a trial witness just two
25 days later. Since that time, Plaintiffs have repeatedly asked Google to produce Mr. Lemoine's
26 custodial documents (without the need to re-review any documents¹) and have reiterated Mr.

27 _____
28 ¹ Google never provided any hit counts for the search terms proposed by Plaintiffs, so Plaintiffs

1 Lemoine's willingness to be deposed. Google never responded and instead filed the instant
 2 motion to prevent Mr. Lemoine from providing any testimony at trial. The Court should not
 3 endorse Google's shenanigans.

4 **II. ARGUMENT**

5 **1. Mr. Lemoine Has Highly Relevant Personal Knowledge.**

6 Google's suggestion that Mr. Lemoine has no relevant knowledge is nothing short of
 7 remarkable. By way of example, as outlined in his sworn declaration, Mr. Lemoine possesses
 8 relevant knowledge regarding Google's use of private browsing data, including:

- 9 • Google's tests, experiments, and training with private browsing data.
- 10 • Google's decision to allow its algorithms, machine learning, and artificial intelligence
 11 services to access users' private browsing data to develop and further those products
 12 and services.
- 13 • The ability of Google's algorithms, machine learning, and artificial intelligence services
 14 to reidentify people and devices, even when they use a private browsing mode such as
 15 Incognito mode.
- 16 • Google CEO Sundar Pichai's direct knowledge of Mr. Lemoine's concerns that signed-
 17 out data (including private browsing data) could bleed into signed-in user sessions.
- 18 • Google's attempts to actively limit written documentation of the above practices and
 19 retaliation against employees who raised concerns.

20 Lemoine Decl. ¶¶ 9-16. These are all core issues in this case. This information is plainly relevant
 21 to Plaintiffs' allegation that Google impermissibly uses private browsing data in myriad ways,
 22 and also to Google's asserted defenses.

23 Rather than engage on the issues that are actually relevant, Google instead resorts to
 24 erecting a strawman. Google makes much ado about Mr. Lemoine's tweets (some academic,
 25 some playful) regarding Google's artificial intelligence products, such as whether Google's

26
 27 currently have no information regarding any burden associated with Google producing any of
 28 Mr. Lemoine's documents. Plaintiffs are willing and ready to negotiate a reasonable production
 and to schedule Mr. Lemoine's deposition.

1 artificial intelligence has rights, whether it is sentient, or whether it has a physical body. Mot.
 2 at 3-4. Google inexplicably suggests it will need to cross examine him on these irrelevant
 3 matters such that it will need to create “mini-trials.”² Mot. at 4. Plaintiffs obviously have no
 4 intention of raising any of these collateral matters that are the subject of Mr. Lemoine’s
 5 irrelevant tweets. Plaintiffs intend to focus on the issues that are actually relevant to this case,
 6 with relevant documents. Google next threatens to raise “sensitive personal matters” should Mr.
 7 Lemoine testify (Mot. at 4), which ironically, is consistent with Mr. Lemoine’s opinion that
 8 Google intimidates and retaliates against employees who raise privacy concerns. Mot. at 4. In
 9 any case, these threats by Google to deter Mr. Lemoine are not a proper basis to silence a former
 10 employee who is willing and ready to provide relevant testimony during the upcoming trial on
 11 matters of public interest.

12 Make no mistake, as a former senior level Google employee, Mr. Lemoine is
 13 effectively a company whistleblower who has unique insider knowledge about Google and
 14 stands ready to testify on matters relevant to this case. Rather than manufacture reasons to
 15 preclude Mr. Lemoine’s testimony, Google should produce his relevant documents and take his
 16 deposition. Google suffers no prejudice from doing so other than receiving testimony
 17 detrimental to its defenses at trial. The only *unfair* prejudice in this dispute is that Google
 18 prevented Plaintiffs from discovering this information sooner.

19 ///

20 ///

21 ///

22 ² None of the “min-trials” decisions cited by Google (Mot. at 4) are on point. In those cases,
 23 either exclusion of evidence was not at issue, the excluded evidence was largely irrelevant or
 24 highly prejudicial, or the court relied on alternative means of informing the jury rather than
 25 directly admit contested evidence. *Blackie v. Barrack*, 524 F.2d 891, 906 n.22, 911 (9th Cir.
 26 1975) (affirming class certification, exclusion of evidence not at issue); *Negrete v. Allianz Life*
 27 *Ins. Co. of N. Am.*, 2013 WL 6535164, at *1 (C.D. Cal. Dec. 9, 2013) (precluding irrelevant
 28 evidence of actions taken by state insurance regulators); *Buckley v. Evans*, 2007 WL 2900173,
 at *5 (E.D. Cal. Sept. 28, 2007) (excluding gossip that prison guards concealed evidence of
 inmate mistreatment in unrelated cases.); *U.S. v. Vazquez-Torres*, 92 F. App’x 502, 504 (9th
 Cir. 2004) (no prejudice shown from excluding evidence from companion cases, and instead
 reading stipulation informing jury of such cases).

1 **2. Plaintiffs Disclosed Mr. Lemoine As Soon As They Became Aware Of His**
 2 **Testimony, And Any Late Disclosure Was Substantially Justified and**
 3 **Harmless.**

4 Parties may use late-disclosed witnesses to supply evidence where the late disclosure
 5 is “substantially justified” or “harmless.” Fed. R. Civ. P. 37(c)(1). In determining whether
 6 failure to timely identify a witness is justified or harmless, courts in this district “have
 7 considered the following factors: (1) the surprise to the party against whom the evidence would
 8 be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the
 9 evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing
 10 party’s explanation for its failure to disclose the evidence.” *Martel v. Hearst Commc’ns, Inc.*,
 11 468 F. Supp. 3d 1212, 1219 (N.D. Cal. 2020). All five factors favor allowing Mr. Lemoine to
 12 testify.

13 First, disclosure of Mr. Lemoine should be no surprise to Google given that Mr.
 14 Lemoine was a former Google employee with relevant knowledge. *Brick Masons Pension Trust*
 15 *v. Indus. Fence & Supply, Inc.*, 839 F.2d 1333, 1340 (9th Cir. 1988) (affirming district court’s
 16 decision to admit new witnesses not mentioned in pretrial order, finding no prejudice in part
 17 because witnesses were employees of defendant and defendant therefore should have known
 18 they would have relevant knowledge). Mr. Lemoine is a former senior employee at Google who
 19 worked at Google from February 2015 to July 2022 and clearly has personal knowledge
 20 regarding Google’s use of private browsing data. It is Google that should have disclosed Mr.
 21 Lemoine as an employee with relevant knowledge at the onset of this case (he was still working
 22 at Google at the time), in addition to designating him as a document custodian. Google now
 23 appears to fault Plaintiffs for failing to identify a witness that Google tried to hide for years.

24 Second, even if Google was somehow surprised, that can easily be cured by producing
 25 his documents and taking his deposition. *Id.* at 1340 (affirming district court’s decision to admit
 26 new witnesses not mentioned in pretrial order, finding no prejudice in part because plaintiff
 27 offered to make the witnesses available for deposition). Google has been on notice of Plaintiffs’
 28 intention to call Mr. Lemoine at trial for over two months. On August 17, 2023, shortly after
 Mr. Lemoine contacted Plaintiffs’ counsel, Plaintiffs notified Google by including Mr. Lemoine

1 on Plaintiffs' witness list. Plaintiffs timely served that witness list, with Mr. Lemoine listed.
2 Google then waited almost three weeks, until September 5, 2023, to ask if Mr. Lemoine intended
3 to testify at trial, which Plaintiffs confirmed that same day and also offered to schedule his
4 deposition. On September 10, 2023, Plaintiffs again offered to schedule that deposition,
5 proposed targeted custodial search terms (with limitations to make sure that Google would not
6 need to re-review documents for any productions), and requested that Google produce
7 responsive documents in advance of that deposition. Plaintiffs followed up with Google again
8 on September 25, 2023. Google never responded to any of these communications or offers for
9 examination, and Google's feigned surprise is meritless. Besides, there remains plenty of time
10 to produce Mr. Lemoine's documents and take his deposition well before trial without prejudice
11 to anyone. *Quinn v. Fresno Cnty. Sheriff*, 2012 WL 3069934, at *2 (E.D. Cal. July 27, 2012)
12 (permitting plaintiff to add late-disclosed witness if witness was made available for deposition
13 before trial).

14 Third, Mr. Lemoine's testimony will not disrupt trial; it will instead facilitate
15 efficiency. Plaintiffs intend to seek testimony from him on matters directly relevant to Google's
16 use of users' private browsing mode and Google's systematic efforts to keep those practices
17 hidden. If anything, Mr. Lemoine's testimony will likely streamline Plaintiffs' trial presentation
18 by obviating the need to call certain Google employees as adverse witnesses. Contrary to
19 Google's nonsensical claim, Plaintiffs will not seek testimony about his tweets or matters not
20 relevant to this case—and neither Google nor Plaintiffs should be motivated to.

21 Fourth, Mr. Lemoine's testimony is important. He will likely be the only testifying
22 witness who, having for many years worked for Google and been subject to Google's culture
23 of intimidation and retribution, has voluntarily chosen to testify at trial about the ways in which
24 Google violates users' privacy. He will testify directly about ways Google uses the private
25 browsing data it collects. Finally, his testimony will demonstrate that the alleged factual
26 premises underpinning Google's defenses in this case are untrue and unfounded.

27 Finally, Plaintiffs' reasons for disclosing Mr. Lemoine after the close of discovery is
28 warranted. The first contact Mr. Lemoine made was a voicemail he left with Plaintiffs' counsel

1 on August 8, 2023. Plaintiffs' counsel met with Mr. Lemoine for the first time on August 15,
 2 2023, and Plaintiffs' counsel then quickly disclosed him as a trial witness for Google on August
 3 17, 2023. Plaintiffs then promptly took steps to arrange for production of his custodial
 4 documents and schedule his deposition. While Google suggests Mr. Lemoine should have been
 5 disclosed sooner, Google offers no basis for how Plaintiffs could have possibly known Mr.
 6 Lemoine had relevant information sooner than they did.

7 The four decisions cited by Google (Mot. at 4-6) are inapplicable here. In both *Bastidas*
 8 and *Starnet*, the court precluded witnesses at trial which the proffering party long knew about
 9 and yet still failed to disclose. *Bastidas v. Good Samaritan Hospital LP*, 2017 WL 1345604, at
 10 **2-3 (N.D. Cal. Apr. 12, 2017) (precluding "plaintiff's friend and colleague" from testifying
 11 at trial because, despite having long known this individual had relevant knowledge, plaintiff
 12 nevertheless failed to timely disclose the witness); *Starnet Intern. Amc. Inc. v. Kafash*, 2011
 13 WL 207987, at *2 (N.D. Cal. Jan. 12, 2011) (precluding Starnet's President from testifying
 14 because Starnet knew about the witness but failed to timely disclose him). The portion of *Fresno*
 15 *Rock Taco, LLC v. National Sur. Corp.* Google cites does not deal with exclusion of witnesses
 16 at all. 2013 WL 3803911, at *10 (N.D. Cal. July 19, 2013). Elsewhere in that opinion, the court
 17 actually permitted new witnesses to testify at trial. *Id.* at **2-3. In *Yeti*, the court affirmed
 18 exclusion of an expert report disclosed one month before trial, finding defendant's failure to
 19 proffer the report earlier was not "substantially justified." *Yeti by Molly Ltd. v. Deckers Outdoor*
 20 *Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Here, Plaintiff disclosed Mr. Lemoine as a trial
 21 witness *two days* after first discussing the case with him, on the same day that the parties were
 22 required to exchange their trial witness lists and would have disclosed him earlier had Google
 23 properly identified him. Any delay in identifying Mr. Lemoine is clearly justified, and in fact
 24 was directly caused by Google's obstruction.

25 **IV. CONCLUSION**

26 For the reasons discussed above, the Court should deny Google's Motion to Exclude
 27 Mr. Lemoine's testimony and allow Plaintiff to call Mr. Lemoine as a witness at trial.

1 Dated: October 25, 2023

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